UNFAIR METHODS OF COMPETITION AND THEIR PREVENTION

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Section V of the Federal Trade Commission Act reads in part as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
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> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

At least until very recently, "unfair competition" has meant, "passing off, or attempting to pass off, upon the public the goods or business of one person as and for the goods or business of another."[1] In other words, "unfair competition" has hitherto referred with but few exceptions[2] to the marketing of goods by methods involving either fraud or misrepresentation, or both. Such a use of this term is both inaccurate and unsatisfactory. Practices of this character would undoubtedly be much more accurately denominated if termed "dishonest competition." That they should be eliminated from business certainly cannot be questioned. But it was neither to facilitate nor to effectuate such a result that "unfair competition" was prohibited by the Trade Commission Act. Rather was this clause intended to stamp out those classes of acts which, for want of a better term, may be described as economically unfair.

These methods[3] are not always easy of classification, but by

[1] Cf. 38 Cyc. 756–759.

[2] Specific exceptions to this rule may be found in the cases. Some of the later legal text writers also consider unfair competition from a broader standpoint. For example, Nims (*Unfair Business Competition*) devotes a chapter to a discussion of interference with a competitor's contracts.

[3] Portions of this article appeared in the *Policital Science Quarterly* in June and September, 1914. Certain other portions are from a revised and enlarged study of the same subject as yet unpublished.

selecting what appear to be their most fundamental characteristics, it is possible to distinguish the following twelve forms of "unfair competition":

I. Local price cutting.
II. Operation of bogus "independent" concerns.
III. Special competitive devices.
IV. Conditional requirements.
V. Exclusive sales and purchase arrangements.
VI. Rebates and preferential arrangements.
VII. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process.
VIII. Manipulation.
IX. Black lists, boycotts, white lists, etc.
X. Espionage.
XI. Coercion, threats and intimidation, etc.
XII. Interference with contracts and business of competitors.

I. Local Price-cutting

Local price-cutting has been a frequent and familiar weapon of various trusts. As here used the term means that an organization cuts the prices of its products to a point below the cost of production in one or more of the localities where competition exists. The loss entailed is usually recouped by the profits from the high prices charged in those regions where competition is either insignificant or non-existent. This method has been employed repeatedly by large and powerful organizations. The ultimate outcome in such cases, with but few exceptions, has been the destruction and elimination of competition in those regions where it has been employed.

Probably the best examples of the operation of local price-cutting are to be found in the histories of the old oil and powder trusts. In the case of the former organization, the prices charged in various localities appear to have been definitely governed by the percentage of competition to be met in each section. An examination of the tables of prices, profits and percentages of competition presented in the *Brief for the United States* in the suit against the Standard Oil Company shows that the prices and profits on oil as between various localities were roughly high or low according as the percentages of competition were low or high. On October 15, 1904, the Standard Oil Company's profits and losses on white-water illuminating oil ranged from as high as 6.48 cents per gallon

profit in Alberquerque, New Mexico, with 7 per cent of competition, and 6.1 cents per gallon profit in Spokane, with no competition, to as low as 3.16 cents per gallon loss in Los Angeles with 33.4 per cent of competition and 1.35 cents per gallon loss in New Orleans with 51.2 per cent of competition.[4]

II. Operation of Bogus "Independent" Concerns

The operation of bogus independent concerns is a method of unfair competition which has been most extensively used. In fact it is perhaps more commonly met with than any other method. Two bogus concerns of the former Powder Trust were called "Yellow Dog Companies" by Mr. T. C. du Pont. An account of their operation illustrates admirably this method of competition:

Q. What do you know about the yellow dog companies, if anything?

A. May I ask a question?

Q. Yes.

A. If the president of the company told me, am I permitted to answer?

Q. Yes. That is my judgment, unless the gentlemen differ with me.

A. During the conversation with Mr. T. C. du Pont, the President, in which he was endeavoring to explain to me the ojects of the trust, he told me that . . . . it was necessary for him . . . . just like a little boy, to have a dog to which he could whistle and call.

Q. What kind of a dog?

A. He termed it "a yellow dog," and he explained to me that after I had exhausted all my resources, and those of the travelling men under my office, that if I was not able to regain the trade, that I was to whistle by writing a letter, and would then send on a little yellow dog, which at that time, in the high explosives business, was known as the Climax Powder Manufacturing Co. of Emporium, and the New York Powder Co. of New York. . . . .

Q. Had you occasion to whistle for the little yellow dog?

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[4] Standard Oil Company *v.* United States of America. In the Supreme Court of the United States, Brief for the United States, Vol. II, pp. 432–436. A copy of these tables will be found in Wm. S. Stevens' *Industrial Combinations and Trusts*. For further examples of local price-cutting by the Standard Oil Company, see Brief for the United States, above cited, Vol. II, pp. 428–500. *Cf.* also United States of America *v.* E. I. du Pont de Nemours and Company *et al.*, United States Circuit Court for District of Delaware, Pet. Rec. Testimony, Vol. I, pp. 99–104, 122–132; United States of America *v.* American Coal Products Company, Barrett Manufacturing Company *et al.*, Petition in Equity, U. S. D. C. for the Southern District of New York, p. 30; United States *v.* American Sugar Refining Company *et al.*, Original Petition, U. S. C. C. for the Southern District of New York, pp. 98–99.

A. Yes, sir.
Q. Did you do so?
A. Yes, sir.
Q. What occurred? State what you did?
A. If we met the prices, that meant the lowering of our prices on our brands; but the little yellow dog would come in, and we would say that we didn't recognize them at all, that their goods were of no account, and were of low grade, and all that kind of thing; so we didn't have to lower our prices to the adjoining trade; but the yellow dog got the business.

. . . . . .

Q. To whom did they belong to, if you know, that is, the Climax Co., and the New York Co.?
A. To the trust.
Q. To the trust?
A. Yes, sir.
Q. Was that the E. I. du Pont de Nemours Powder Co.?
A. Yes, sir.[5]

III. Special Competitive Devices

Closely related to local price-cutting and to the operation of bogus independents, is the use of special devices for the purpose of destroying competition. Prominent among these are the so-called "fighting ships" employed by the various steamship conferences. The "fighting ship" is called into service when a new line is started in a trade nominally controlled by conference lines. As soon as the new competitor announces a sailing date, the conference issues a circular to shippers advertising a steamer to sail upon or about the same date. The conference circular usually offers a rate below the actual cost of transportation. The object is to prevent the new competitor from securing a cargo.[6]

An interesting development of this idea is found in the *Syndikats-Rhederei*. This organization is a corporation through which are operated the fighting ships of the six largest Hamburg steamship companies engaged in the extra-European trade. It is a vessel-owning company with a capital of $1,428,000. Nominally it is engaged in commercial transportation enterprises. Primarily it is a defensive corporation, the capital stock being owned in various pro-

[5] U. S. *v.* du Pont de Nemours and Company, *cit supra*. Pet. Rec. Testimony, Vol. II, pp. 685 ff.

[6] Proceedings of the Committee of Merchant Marine and Fisheries in the Investigation of Shipping Combinations, pp. 265, 1252–1254, 1257. Numerous specific illustrations of this practice will be found scattered through the same report.

portions by the following companies: Hamburg-American, Hamburg-South-American, German Steamship Company, C. Woerman, German Australian Steamship Company, and the German East African Company. The proportion of shares held by each is determined with reference to the tonnage of each line. Four small and relatively inexpensive ships were purchased. These with others chartered when the need arises are "hired out" to meet competition and to make it unprofitable. When not engaged in a fight, these steamers find employment upon regular time charters.[7]

Easily the most notorious instance of the use of fighting brands is the plug tobacco war which continued roughly from 1894 to 1898. In the early stages of this fight, the old American Tobacco Company possessed a relatively small proportion of the plug tobacco output of the United States. In 1894 its total production was only 8,974,118 pounds. At least three companies were annualy producing a much greater amount than this. As early as 1890 Liggett and Myers claimed to be manufacturing twenty-seven million pounds annually. Next to Liggett and Myers ranked the Lorillard Company; and in 1893 the output of the Drummond Tobacco Company of fourteen million pounds was far in excess of the American's.

The principal brand which was selected by the American Tobacco Company for the attack upon its competitors was known as "Battle Axe." In 1891 this tobacco sold at retail for fifty cents a pound. In 1894 consumers purchased it for thirty cents. In the succeeding year for a time the price to jobbers was as low as thirteen cents. As at that time the internal revenue tax was six cents this price left only seven cents a pound to pay for the labor and the cost of manufacture and distribution. In the four years from 1894 to 1897 the proportion of the plug tobacco output of the United States controlled by the American increased from 5.6 to 20.9 per cent. In the same time the earnings of that organization declined heavily. In 1894 net earnings were approximately five million. In the next year, with an increase of nearly twelve

[7] Report of Robert P. Skinner, Consul-General at Hamburg, Germany, *Special Diplomatic and Consular Reports for the Use of the Committees on Merchant Marine and Fisheries dealing with Methods and Practices of Steamship Lines Engaged in the Foreign Carrying Trades of the United States*, pp. 53–54.

million pounds in sales of plug tobacco, the earnings were approximately one million less. The accounts of that company show that the loss on the manufacture and sale of plug tobacco in 1896 amounted to over one million dollars. Although in 1897 the American Tobacco Company sold over thirty million pounds more of plug than in 1894, its earnings were approximately eight hundred thousand dollars less; while in 1898 the loss on the plug tobacco business was over eight hundred thousand.[8]

IV. Conditional Requirements

Perhaps the most interesting of any of the methods of unfair competition is the requirement that, in order to obtain certain articles, a concern shall lease, sell, purchase or use certain other articles. The successful imposition of such requirements is usually most destructive to competition. An organization may require:

A. The purchase or lease of articles upon which the patents have expired, as a condition of obtaining other articles.

B. The use of certain patented articles, as a condition of obtaining other articles.

C. The purchasing, selling or handling of a certain article or line of articles, as a condition of the purchase or handling of another article or line of articles.

A. By a series of contracts made in 1906 and 1909 with foreign parties, the Electric Lamp Combination acquired the exclusive rights in the United States to the inventions, patents and applications covering tungsten and tantalum filament lamps. The advantages of lamps of these types—economy in the cost of service, etc.—are too well known to require enumeration. An extensive demand for them arose in the United States and jobbers and dealers were practically compelled to stock them. The combination thereupon offered a contract which provided for the sale of tungsten and tantalum filament lamps to such dealers and jobbers as would also purchase from it all of the carbon-filament lamps which they required. The patent upon carbon-filament lamps had expired in 1894. The contract therefore was unquestionably an attempt to compel dealers and jobbers to purchase solely from the combination certain articles upon which the patents had expired.[9]

[8] *Report of the Commissioner of Corporations on the Tobacco Industry, Part I*, pp. 96–98.

[9] United States *v.* The General Electric Co., Petition, *cit. supra*, pp. 10–11, 27–32. It should be noted that the final decree of the court in this case forbade the continuation of this practice.

B. The manufacturer's license agreement of the Motion Picture Patents Company contains the following clause:

> The licensor hereby grants to the licensee . . . . the right and license . . . . to manufacture, print and produce positive motion pictures . . . . upon condition that they be used solely in exhibiting or projecting machines containing the inventions, or some of them of said letters patent . . . . and licensed by the licensor.[10]

It is probably clear that in this case the Motion Picture Patents Company, by virtue of its large control of the film output has endeavored to compel the use of motion picture machines containing one or more of the patents which it controls.

C. The Commissioner of Corporations in his report on the International Harvester Company has used the term "full-line forcing" to describe "the practice of requiring dealers to order new lines[11] . . . . as a condition to retaining the agency for some brand of the company's harvesting machines."[12]

[10] License Agreement under the Camera and Film Patents between Motion Picture Patents Company and Biograph Company, Dec. 18, 1908, Sec. (*f*), Clause 1. United States of America *v.* Motion Picture Patents Company *et al.* Original Petition, U. S. D. C. for the Eastern District of Pennsylvania, Exhibit 3, p. 55.

[11] By the gradual acquisition of various concerns in the years subsequent to organization, the International secured certain new lines. Among these concerns were plants for the manufacture of farm wagons, manure spreaders, and plows. In addition it began the production of gasoline engines in 1904, cream separators in 1905, and tractors in 1909.

[12] Report of the Commissioner of Corporations on the International Harvester Company, p. 306 *et seq.* The report states that complaint of this practice came to the Bureau from a number of independent dealers and manufactures. It is supported by the extracts drawn from the record in the case of the United States *v.* The International Harvester Company and cited in the government's brief. For example, Claypool, general agent, wrote Perrot, one of the blockmen, Feb. 3, 1912, regarding the approval of two commission agency contracts sent in by the latter: "How about manure spreaders, wagons, cream harvesters (*sic*), engines, tillage implements etc.? . . . . If these two dealers will not take hold of our other lines, it will be necessary for our own protection to make other arrangements." *Cf.* United States *v.* International Harvester Company and others, Brief for the United States, U. S. D. C. for the District of Minnesota, p. 124. *Cf.* also *ibid.*, pp. 123 and 125. In justice to the Harvester Company it should be said that it introduced testimony to prove that the charge of full-line forcing was untrue. *Cf.* Appendix to Defendant's Brief, Evidence as to Certain Points Abstracted and Topically Arranged, United States *v.* International Harvester Company, *cit. supra*, pp. 382 *et seq.* But it is also true that the assistant

V. Exclusive Sales and Purchase Arrangements

The requirement that a dealer shall handle only a given article or line of articles is not a restriction of recent invention. Many factors' agreements, possibly the larger proportion of them, contain a clause of this character.[13] For this reason more than for any other, such agreements have been denounced as destroyers of competition, and agents of monopoly.

The factors' agreement of the National Wall Paper Company of 1896 contained the following clause: "3. The purchaser expressly guarantee and agree that between September 1, 1896, and June 30, 1897, will not purchase or acquire any wall paper or hangings the product of any person or corporation other than the company. . . . ."[14] Another exclusive clause not of modern origin may be quoted from the factors' agreement of the American Tobacco Company dated October 1, 1895: "Eleventh. Upon your acceptance in writing of the terms and conditions of this agreement, you understand and agree that you will handle our cigarettes exclusively. . . . ."[15]

A more recent instance of an exclusive arrangement is to be found in the so-called "jobbers' license agreement,"[16] of the recently dissolved Bathtub Trust. This document contained the following clause:

general manager of the International admitted that "full-line forcing" had been used (Commissioner of Corporations on International Harvester Company, p. 309), though claiming that it was not to be regarded as a policy of the company but rather as an unauthorized act, with a view to increasing sales.

[13] The fact should not be lost sight of that clauses of this character are merely a written manifestation of such arrangements. They are not necessary to exclusive selling or purchasing, for these things can be secured without any written contract.

[14] Report and proceedings of the joint committee of the Senate and Assembly appointed to investigate trusts. State of New York, Senate Document No. 40, 1897, pp. 804–5. The somewhat garbled wording is as it appears in the original.

[15] *Ibid.*, p. 881.

[16] The term "License Agreement" is rather a misnomer as implying the permission to manufacture or sell a patented article. The agreement in question, in addition to the exclusive sales arrangement, provided for the maintenance of prices upon sanitary enameled ironware, which was absolutely unpatentable in itself, although in its manufacture, a patented tool was used. The contention of the combination was that this fact constituted sufficient ground for the creation of this and other agreements but this was denied by the court. Hence the term "License Agreement" is inappropriate in this connection. *Cf.* 226 U. S. 20.

10. The Purchaser[17] also agrees during the life of this contract not to purchase, sell, advertise, solicit orders for, or in any way handle or deal in Sanitary Enameled Iron Ware of any manufacturer *not licensed* . . . . except with the express written permission of the Licensor.[18]

VI. Rebates and Preferential Arrangements

Discriminations in the form of rebates and preferential contracts are made by two classes of organizations:

A. Manufacturing and trading companies.

B. Transportation companies.

A. One of the most common methods of securing exclusive selling is by the use of a rebate. The exclusive sales contract for photographic paper in effect May 1, 1901, contained this clause:

On or about the 20th of each month a memorandum showing amount of previous month's net paper purchases will be sent each dealer from each factory. If this memorandum is returned at the time indicated thereon, properly signed and verified to the satisfaction of this company, a credit amounting to 12 per cent on the net purchases will be made. . . . .

Fifteen per cent represents the full trade discount on paper, but *an extra credit* as stated above *is offered as a special consideration* for advantages accruing . . . . through having our specialties sold in original packages and at a price that affords the dealer a profit large enough to warrant his energetically and *exclusively* pushing their sale.[19]

A second and different kind of discrimination appears in the case of the former Electric Lamp Combination. The government charged that the Electric Lamp Combination entered into preferential contracts with the Libby Glass Company, the Fostoria Bulb and Bottle Company, the Phoenix Glass Company and the Corning Glass Works. These four were "substantially the only manufacturers" of glass bulbs and tubing in the United States. The combination, on condition that these concerns should sell to independent lamp manufacturers, *only* at higher prices than it was itself compelled to pay, agreed to purchase from them its entire supply of these

[17] The jobber.

[18] Italics are the writer's. United States of America *v.* Standard Sanitary Manufacturing Company *et al.*, U. S. C. C. for the District of Maryland, Record, Vol. II, p. 37.

[19] Italics are the writer's. Quotation is taken from the terms of sale supplied by W. S. Hubbell, counsel for the General Aristo Company. Report of the United States Industrial Commission on Trusts and Industrial Combinations (second volume on this subject), Vol. XIII, p. 192. At that time the Eastman Kodak Company was the trade agent to market all the goods of the General Aristo Company.

materials. A contract of a similar nature was also made with the Providence Gas Burner Company, the sole manufacturer of bases in this country.[20]

B. The doctrine that railroad rebates constitute unfair competition as against those concerns not benefited thereby is now so well established that it requires little examination or discussion. The history of the old Standard Oil Company is replete with instances of railroad rebates. It is true that with the passage of interstate commerce legislation there disappeared many of the more open forms of rebates which had characterized the earlier history of that organization. But this does not mean that the Standard ceased to be the recipient of favors. On the contrary it continued to enjoy advantages over competitors that were equivalent to rebates, at least in their effect upon competition. Secret rates, discriminations in open and published rates against independent as compared with Standard Oil refining points, blind and false billing and discriminations in the classification and rules for the shipment of oil may be enumerated as among such advantages.[21]

VII. Acquisition of Exclusive or Dominant Control of Machinery or Goods Used in the Manufacturing Process

Attempts to acquire control of the machinery necessary to the manufacture of goods date from nearly three decades ago. On or about April 30, 1887, the Standard Envelope Company[22] made a contract with Lester and Wasley of Norwich, Connecticut, to purchase all the envelope machines which that firm might make or sell during the five succeeding years. At the same time Lester and Wasley on their part agreed not to furnish more than twenty-four machines in any one year.[23] Whether or not this firm was the sole manufacturer of envelope machinery does not appear.

[20] United States *v.* General Electric Co. Petition, *cit. supra*, pp. 35–36. Note that these practices were forbidden by the decree of the court in this case.

[21] *Report of the Commissioner of Corporations on the Transportation of Petroleum.*

[22] The Standard Envelope Company was a corporation of Massachusetts organized by, and used as a clearing house for, a combination of several of the largest envelope manufacturers of the United States. For a brief account of the organization and operation of this combination, see an article by the writer in the *American Economic Review* for September, 1913, Vol. III, p. 561.

[23] Report of the Committee on General Laws, on the investigation relative to trusts. New York Senate Document, No. 50, 1888, p. 469.

In January, 1914, the Graham Wood Company of Brooklyn brought suit against the Standard Wood Company and the Greene Manufacturing Company in the Supreme Court of New York County. The Greene Manufacturing Company manufactures machines known as "presses," which are useful and necessary in the manufacture of bundled kindling wood. In return for an annual consideration of $5000 the Greene Manufacturing Company appointed the Standard Wood Company its exclusive sales-agent and further agreed not to sell any press without the consent of the Standard Wood Company. The action of the Graham Wood Company was brought primarily on account of the injurious results of a refusal to sell such machinery to it.[24]

VIII. Manipulation

The term "manipulation," for want of a better, has been employed to include certain practices and methods which have occasionally appeared. It is charged that when the Naval Stores Export Company began active business, the Naval Stores Combination inaugurated a fierce trade warfare against it. The Naval Stores Export Company accumulated a considerable quantity of resin and spirits of turpentine. Much of this stock was hypothecated with banks. By manipulation the combination caused the Savannah market for turpentine to decline some 30 per cent within a period of a couple of weeks. The Export company was requested to furnish additional margins. This it was unable to do, and as a result was forced to sell out its accumulated stock at losses which nearly wiped out its capital stock.[25]

IX. Blacklists, Boycotts, White-Lists, Etc.

Most of the cases of blacklisting and boycotting which the writer has been able to discover are in connection with the operations of various wholesale and retail trade organizations. In

[24] United States of America *v.* Standard Wood Company and Others. Original Petition, U. S. C. C. for the Southern District of New York, p. 14; Graham Wood Company *v.* Standard Wood Company and the Greene Manufacturing Company, Supreme Court, New York County. Typewritten copy of Motion for Judgment, pp. 1–2.

[25] United States of America *v.* American Naval Stores Company, *et al.* Petition in Equity, U. S. D. C. for the Eastern Division of the Southern District of Georgia, pp. 11–12.

these cases such methods develop out of the practice known as classification. The purpose of classification may be said to be to confine trade to what the various wholesale and retail associations regard as its legitimate channels, *i.e.*, from manufacturer to wholesaler, to retailer, to consumer. Steps are taken and rules formulated to classify the trade into these four groups, manufacturers, wholesalers, retailers, and consumers. The usual method is by the use of more or less arbitrary definitions of each one of these terms. On this classification is based the standing of any concern in the trade.

Let us examine the ways in which this classification is used. In the first place several trade associations publish trade lists known by various titles as "Red Books," "Green Books" or "Blue Books." In these lists are published the names of all individuals, firms and corporations regarded by the trade (in accordance with the rules of classification mentioned) either as wholesalers or retailers, as the case may be. Such a list of retailers would indicate to manufacturers or wholesalers those concerns which were regarded by the trade as the legitimate customers of either or both. A list of wholesalers or jobbers would give a similar indication to the manufacturer. Only those individuals and concerns appearing in such lists (or in separate classification sheets issued by some organizations) are entitled to obtain goods at the trade discounts which are allowed the different classes. Obviously the "Red," "Blue" and "Green Books" operate as a fair list. Concerns not listed are of two classes: first, those which are not regarded by the trade as legitimate wholesalers or jobbers on the one hand, or as legitimate retailers on the other; second, those whose names may have been removed from the list because of a violation of so-called trade ethics. In addition some of these associations have from time to time issued to the trade, lists of concerns making sales to other than legitimate customers, the implication being that the trade should refrain from dealing with such concerns.[26]

[26] In this connection and on this general subject *cf.* United States *v.* Eastern States Retail Lumber Dealers' Association. Petition, *cit supra*, Exhibits, J, K, L, O, S, T, W, X, Y and Z, p. 88 ff.; United States of America *v.* Willard G. Hollis and Others. Petition, U. S. C. C. of the District of Minnesota, Exhibit A, p. 69; United States *v.* Southern Wholesale Grocers' Association, Decree of Injunction, p. 5; United States *v.* Hartwick. Original Petition, *cit supra*, Exhibit A, p. 42; United States *v.* Pacific Coast Plumbing Supply Association. Petition,

X. Espionage

It is a well known fact that more than one organization has utilized extremely questionable methods in order to obtain information in regard to the business and operations of its competitors. The pioneer in these methods was probably the old Standard Oil Company and both that organization and the National Cash Register Company seem to have carried such methods to the highest degree of development.

There are, for example, masses of evidence in regard to this practice as used by the old Standard Oil Company. That organization obtained much information in regard to the business of competitors from the reports of oil inspectors and by bribing railroad officials. It also made extensive use of spies and detectives for following the tank wagons of competitors and thus tracing the source of their business.

The National Cash Register Company employed secret agents who were not known to be in any way connected with it. Such agents were utilized for various purposes.[27] For one thing they were used to supply information regarding competitive business which would not have been obtained if the secret agent had been known to be connected with the National. During the time when the Foss Novelty Company was in business one Ellingwood was employed by the National to supply inside information as to where that organization placed machines, the amount of business which they did, etc. At that time Ellingwood was acting as salesman for the the Foss Novelty Company. He was paid a salary of $25 a week by the National.[28]

Pinkerton detectives were employed by the National Cash Register Company during the Hallwood fight to secure information in regard to that organization.[29] From about November or

cit supra, pp. 12–14; United States of America *v.* Master Horseshoers' National Protective Association of America and Others. Petition in Equity, U. S. D. C. for the Eastern District of Michigan. Southern Division, p. 18 ff.; United States of America *v.* Philadelphia Jobbing Confectioners' Association and Others. Petition in Equity, U. S. D. C. for the Eastern District of Pennsylvania, pp. 5–9.

[27] Carl G. Heyne, State *v.* National Cash Register Company, Record, Vol. II, pp. 909.

[28] J. E. Warren, State *v.* National Cash Register Company, Record *cit supra*, Vol. I, p. 454; Carl G. Heyne, *ibid.*, Vol. II, p. 915.

[29] Lee Counselman, *ibid.*, Vol. I, pp. 602—603.

December, 1904, to March or April, 1905, Pinkerton agents were again employed. Heyne was introduced to the superintendent of the agency and instructed by the assistant general manager of the National to have him supply two operatives to spy upon the affairs of the International Cash Register Company of Columbus.[30]

XI. Coercion, Threats, Intimidations, etc.

In the course of the struggle in the business world, statements may be made, letters written, or acts done which are either openly or impliedly threatening and which are intended to intimidate and coerce.

On January 15, 1910 the Keystone Watch Case Company mailed a circular letter to the jobbing trade from which the following is quoted:

> Whether or not our wishes as heretofore stated be complied with we shall from time to time exercise our right to select the jobbers to whom we shall sell our goods and we shall, irrespective of any past dealings, refuse to sell to those jobbers who in our opinion handle our goods in a manner detrimental to our interests or whose dealings with us are in any other respects unsatisfactory.[31]

The "Confidential Statements" of the National Cash Register Company were gotten out against various concerns. They "contained a record of all suits, opinions of patent attorneys, and anything that appeared to be in evidence against that particular company."[32] In the Michigan case, Counselman explained the purpose of these statements as follows:

> A. Well, the object was to frighten them. Those statements were gotten out to dealers and agents and to district managers; they were gotten out for

[30] Carl G. Heyne, *ibid.*, pp. 988–990.

[31] It should be noted that one of the "wishes" expressed by the company in this letter was that jobbers should not handle the goods of its competitors. United States of America *v.* Keystone Watch Case Company, Petition in Equity U. S. C. C. for the Eastern District of Pennsylvania, p. 14.

[32] Lee Counselman, Patterson *v.* United States Record U. S. C. C. of App. Sixth Circuit, Vol. I, p. 405. Counselman also testified in the same suit that except for the first two or three the confidential statements were made up under his supervision and that President Patterson was the one who first thought of the idea. (Counselman, *ibid.*) Chalmers testified that the first of the confidential statements was prepared by President Patterson, Counselman, Morse and himself and that it was "O. K.'d" by Sigler as attorney before it was sent out. Hugh Chalmers, Patterson *v.* U. S. Record *cit. supra*, Vol. I, p. 503.

that purpose, so that it would not look as if they were gotten out for any one competitor.

Q. And were they sent out as matter for salesmen and agents?

A. No.

Q. To whom were they sent?

A. They were sent to the competitor that they were gotten up on.

Q. But apparently addressed to your agent or salesman?

A. Well, it was meant to appear that some agent mailed it in to them.[33]

XII. Interference with Contracts and Business of Competitor

Interference with a competitor may take a number of different forms. Salesmen may be harassed, customers induced to break contracts, etc.

The St. Louis Steel Range Company is engaged in the sale of ranges throughout a considerable number of states. The agents or salesmen of this organization travel with a sample or model from the city of St. Louis into and through these states calling upon farmers and others in their houses soliciting and securing orders for ranges. The Wrought Iron Range Company of Missouri is engaged in the business of selling ranges through salesmen carrying a full-sized stove upon a specially built wagon. In or about March, 1914, the latter company began a campaign against the former, interfering with the sale of the goods of the Steel Range Company. According to the allegations, the Steel Range Company's men were followed by one and sometimes two of the Wrought Iron Company's men, who in some cases were armed. Whenever the employees of the Steel Range Company attempted or undertook to converse with a farmer or other prospective purchaser the conversation was interrupted by the employees of the Wrought Iron Company who attempted to dissuade the customer from purchasing the St. Louis Company's goods. The Wrought Iron Company's men insisted that the St. Louis goods were worthless; that the Steel Range Company conducted a fraudulent business; that the farmer or other purchaser would be cheated; that the enamel on the ranges would scale, chip, crack and fly off; and that the stove would never be delivered, etc.

In certain cases when the employees of the Wrought Iron Company had discovered the route which an employee or employees

[33] Lee Counselman, State *v.* Cash Register Co., Record *cit. supra*, Vol. I, p. 606.

of the St. Louis Company intended to travel the next day, they would precede such employee or employees and call upon persons along the road relating similar stories. Tactics of this character, it is alleged in the petition, have been responsible for the elimination of thirteen concerns[34] and individuals from this line of business in the course of a long period of years, beginning as far back as 1888.[35]

From the standpoint of society it is probably immaterial whether the goods produced for consumption and the satisfaction of its wants are the product of a monopolistic or a competitive system. Society is interested only in seeing that they are produced by that form of industrial organization which is the most efficient. As to whether monopoly or competition is that form of organization, we have so far had no means whatsoever of determining, though the Report of the Commissioner of Corporations on the Harvester Company and Part III of his Report on the Tobacco Industry contains some interesting information regarding this question. It becomes, therefore, of fundamental importance that unfair practices should be eliminated in order that we may have the opportunity to observe the results upon business of free and fair competition. When competition is freed from the artificial restraints to which it is now subjected, and not before, it will become possible to really test its social value; to compare it with the social savings of a monopolistic organization of industrial society.

In order to obtain this desired and highly necessary result our new trust legislation has prohibited unfair methods of competition and given the trade commission jurisdiction to prevent them under an arrangement which is admirably adapted for this purpose.[36] Now the contention can be forcibly advanced that all unfair methods of competition fall within the scope of either the "restraint of trade" or "monopoly" sections of the Sherman Anti-trust Act. In other words all acts of unfair competition are either contracts, combinations or conspiracies in restraint of trade, or else constitute monopolization, attempts to monopolize, or combinations and conspiracies to monopolize. It may be alleged, therefore,

[34] Concerns are cited by name in the petition.

[35] St. Louis Steel Range Company *v.* Wrought Iron Range Company, Petition U. S. D. C. for the Eastern District of Missouri, Eastern Division, pp. 3–7.

[36] *Cf.* Section V of the Trade Commission Act, W. H. S. Stevens, The Trade Commission Act, *American Economic Review*, December, 1915, Vol. IV, pp. 850–851 and other articles in this volume.

that it was entirely unnecessary to specifically forbid unfair competition by legislation. This view gains strength from the fact that numerous injunctions in suits brought by the government have flatly forbidden in specific cases the use of several of the practices described in this study. This has been true of the decrees against the American Thread, Burroughs Adding Machine, Keystone Watch Case, General Electric and American Coal Products companies and also of those against the Eastern States Retail Lumber Dealers and Southern Wholesale Grocers Associations.

Despite this situation, however, there is good reason for regarding the view under discussion as erroneous. Under the rule of reason laid down by the Supreme Court in the oil and tobacco cases, every act, contract or arrangement must be construed in the light of reason.[37] Such a view apparently opens up a considerable field in which acts of unfair competition might be regarded as legal. Various contracts, arrangements and acts may conceivably be resorted to for a purpose in itself legal and yet result indirectly in destroying or damaging competitive business of equal or superior efficiency. Under the rule of reason, if a given act, contract or arrangement is *per se* legal, the fact that it partially or indirectly results in unfair competition would not probably be sufficient to constitute it an unreasonable restraint of trade and thereby bring it within the scope of the Sherman Act. It would therefore appear to follow that things which result only indirectly in unfair competition could be regarded perhaps under the older legislation as being merely reasonable restraints of trade. In this way many things might be done which would gradually destroy competition or prevent it from coming into being and thus very slowly a monopoly might be built up.

On the other hand the general prohibition of unfair competition by the new trust legislation would appear to extend to all acts of this character without exception. It therefore follows, I think, that the new legislation represents an advance over the old in the direction of eliminating such practices.

Some may be inclined to feel that although unfair competition ought to have been prohibited, the new legislation should have stopped at that point; that it ought not to have invested in the

[37] This rule has been restated by the Supreme Court and accepted by the lower courts. It may, I think, be now considered as well established.

commisssion the power to act to prevent it but instead should have allowed this to be taken care of by the courts. In answering those who are inclined to take this view, certain points should be carefully considered. The new trust legislation has provided a body of men with very broad investigatory powers. These men are, impliedly at least, to devote considerable attention to the study of unfair competition. They ought therefore to become specialists in this subject. If so, their orders are likely to be based upon economic rather than upon legal grounds. In consequence they should have even more weight than the decisions of the courts have had in cases involving unfair competition. Moreover, it is also true that a court, the Circuit Court of Appeals, may by its decree alter or modify the order of the commission upon application. This will prevent any injustice which might result from the orders of that body. At the same time, through placing in the hands of the commission the power to make orders, the new legislation will tend to develop an economic rather than a legal view of unfair competition.[38]

[38] *Cf.* on these points W. H. S. Stevens, The Trade Commission Act, *American Economic Review*, December, 1914, and The Clayton Act, *ibid.*, March, 1915.